

EXPLANATORY STATEMENT

Enhancing Online Safety Act 2015

Enhancing Online Safety (Protecting Australians from Terrorist or Violent Criminal Material) Rule 2019

Issued by the Authority of the Minister for Communications, Cyber Safety and the Arts

Purpose and operation of this instrument

The new function of the eSafety Commissioner created by this instrument is to promote online safety for Australians by protecting Australians from access or exposure to material that promotes, incites or instructs in, terrorist acts or violent crimes.

The horrific Christchurch terror attacks, and the subsequent viral dissemination of the perpetrator's video and manifesto, demonstrated that there is a risk posed to Australian internet users by material involving terrorist acts or violent crime.

Under the *National Classification Code* made in 2005, the Classification Board is required to classify material, including publications, films and computer games that "promote, incite or instruct in matters of crime or violence" as RC (refused classification). Where material is classified RC, it is prohibited for that material to be exhibited, sold or hired in Australia. The eSafety Commissioner has existing powers under Schedules 5 and 7 to the *Broadcasting Services Act 1992* regarding material that has been classified RC. However, many offshore sites are reckless, or even malicious, in exposing Australian internet users to content that has been classified RC due to the abhorrent nature of that material.

The new function provided for by this instrument reflects the intention that the eSafety Commissioner have a further role focussed specifically on reducing Australian internet users' exposure to horrific material that promotes, incites or instructs in terrorist acts or violent crimes.

The type of content that the eSafety Commissioner will engage with in relation to terrorist acts or violent crime is material that "promotes, incites, or instructs in" those acts or crimes. This recognises that content showing horrific actions may be depicted for legitimate purposes, such as in documentary or academic work. However, the promotion, incitement or instruction in these types of acts or crimes is materially different and should not be considered acceptable.

The new function specified in this instrument recognises that the eSafety Commissioner's role in educating Australians, promoting online safety and reducing exposure to harmful online material, should extend to terrorist and violent criminal content due to the risk that this material poses to Australian internet users.

This broad role of the eSafety Commissioner is reflected under Subdivision H of Division 474 of the *Criminal Code*, which empowers the eSafety Commissioner to issue notices in relation to content and hosting services that host abhorrent violent material.

The eSafety Commissioner was also a member of the Taskforce to Combat Terrorist and Extreme Violent Material Online that was established by the Prime Minister to explore avenues for collaboration between industry and Government to prevent the upload and dissemination of this type of material.

This instrument will allow the eSafety Commissioner to exercise powers under relevant legislation to take action, where required, to reduce Australian internet users' exposure to material that promotes, instructs or incites in matters of terrorist acts or violent crimes.

Regulation Impact Statement

The Office of Best Practice Regulation has been consulted and a Regulatory Impact Assessment is not required (OBPR number: 25221)

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the following:

- the Office of the eSafety Commissioner
- The Australian Federal Police
- Communications Alliance (on behalf of internet service providers).

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the *Legislation Act 2003* applies to cause a statement of compatibility to be prepared in respect of that legislative instrument. A statement of compatibility is set out at **Attachment B**.

Legislative Authority

The Minister has the power under subsection 108(1) of the *Enhancing Online Safety Act 2015* (Act) to make a rules prescribing matters required or permitted by the Act to be prescribed in legislative rules. Paragraph 15(1)(r) provides that the functions of the eSafety Commission are any such functions that are specified in the legislative rules.

Commencement

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulations commence on the day after they are registered on the Federal Register of Legislation.

Details of the Enhancing Online Safety (Protecting Australians from Terrorist or Violent Criminal Material) Rule 2019

Section 1 – Name

This section provides that the title of the Rule is the *Enhancing Online Safety (Protecting Australians from Terrorist or Violent Criminal Material) Legislative Rule 2019*.

Section 2 – Commencement

This section provides that this instrument commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that this instrument is made under subsection 108(1) of the *Enhancing Online Safety Act 2015*

Section 4 – Definitions

This section provides the definitions for the purposes of this instrument.

Act means *Enhancing Online Safety Act 2015*

Terrorist act has the same meaning as in Part 5.3 of the *Criminal Code* (see section 100.1). At the time this instrument was made, ‘terrorist act’ meant any of the series of actions listed in subsection 100.1(2) of the *Criminal Code*, or threats of those actions, where the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and the action is done or the threat is made with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or intimidating the public or a section of the public.

The actions listed in subsection 100.1(2) include those causing serious harm to persons or property, or serious risk of harm to a person, to health and safety or various critical infrastructure as described in greater detail in the *Criminal Code*. However, the definition excludes, in subsection 100.1(3) of the *Criminal Code*, certain actions taken for advocacy, protest, dissent, industrial action where there was no intent to cause harm etc.

Violent Crime has the same meaning as abhorrent violent conduct under Subdivision H of Division 474 of the *Criminal Code*. At the time this instrument was made, a person engages in abhorrent violent conduct if the person engages in a terrorist act; or murders another person; or attempts to murder another person; or tortures another person; or rapes another person; or kidnaps another person.

Section 5 – Conferral of additional function

This section sets out that that, for the purposes of paragraph 15(1)(r) of the Act, a function of the Commissioner is to promote online safety for Australians by protecting Australians from

access or exposure to material that promotes, incites, or instructs in, terrorist acts or violent crimes.

This section considers the incitement, instruction and promotion of terrorist acts or violent crimes. It is generally accepted that this nature of material is not acceptable to Australian society. This function will enable the eSafety Commissioner to continue to engage in the primary function of protecting Australians online, particularly with respect to protecting Australians from violent criminal or terrorist material.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Enhancing Online Safety (Protecting Australians from Terrorist or Violent Criminal Material) Rule 2019

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The new function of the eSafety Commissioner created by this instrument is to promote online safety for Australians by protecting Australians from access or exposure to material that promotes, incites or instructs in, terrorist acts or violent crimes.

The horrific Christchurch terror attacks, and the subsequent viral dissemination of the perpetrator's video and manifesto, demonstrated that there is a risk posed to Australian internet users by material involving terrorist acts or violent crime.

Under the *National Classification Code* made in 2005, the Classification Board is required to classify material, including publications, films and computer games that "promote, incite or instruct in matters of crime or violence" as RC (refused classification). Where material is classified RC, it is prohibited for that material to be exhibited, sold or hired in Australia. The eSafety Commissioner has existing powers under Schedules 5 and 7 to the *Broadcasting Services Act 1992* regarding material that has been classified RC. However, many offshore sites are reckless, or even malicious, in exposing Australian internet users to content that has been classified RC due to the abhorrent nature of that material.

The new function provided for by this instrument reflects the intention that the eSafety Commissioner have a further role focussed specifically on reducing Australian internet users' exposure to horrific material that promotes, incites or instructs in terrorist acts or violent crimes.

The type of content that the eSafety Commissioner will engage with in relation to terrorist acts or violent crime is material that "promotes, incites, or instructs in" those acts or crimes. This recognises that content showing horrific actions may be depicted for legitimate purposes, such as in documentary or academic work. However, the promotion, incitement or instruction in these types of acts or crimes is materially different and should not be considered acceptable.

The type of content that the eSafety Commissioner will engage with in relation to terrorist acts or violent crime is material that "promotes, incites, or instructs in" those acts or crimes. This recognises that content showing horrific actions may be depicted for legitimate purposes, such as in documentary or academic work. However, the promotion, incitement or instruction in these types of acts or crimes is materially different and should not be considered acceptable.

The new function specified in this instrument recognises that the eSafety Commissioner's role in educating Australians, promoting online safety and reducing exposure to harmful online material, should extend to terrorist and violent criminal content due to the risk that this material poses to Australian internet users.

The eSafety Commissioner was also a member of the Taskforce to Combat Terrorist and Extreme Violent Material Online that was established by the Prime Minister to explore avenues for collaboration between industry and Government to prevent the upload and dissemination of this type of material.

This instrument will allow the eSafety Commissioner to exercise powers under relevant legislation to take action, where required, to reduce Australian internet users' exposure to material that promotes, instructs or incites in matters of terrorist acts or violent crimes.

Human rights implications

Freedom of opinion and expression

This instrument engages the right to freedom of opinion and expression in article 19 of the *International Covenant on Civil and Political Rights (ICCPR)*.

Article 19 of the ICCPR states that a fundamental right is the right "to seek, receive and impart information or ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice".

The right to freedom of opinion and expression is not absolute. Article 19(3) states that this freedom may be subject to special duties and responsibilities. A restriction may occur where it is provided by law and is relevantly necessary for the respect of the rights or reputations of others; or for the protection of national security, public order, or public health or morals.

The proposed instrument would enable the eSafety Commissioner to "promote online safety for Australians by protecting Australians from access or exposure to material that depicts, promotes, incites, or instructs in, terrorist acts or violent crimes". In doing so, the instrument would limit the right to freedom of opinion and expression of internet service providers to host or share material that promotes, incites, or instructs in, terrorist acts or violent crimes.

To the extent that this instrument limits Article 19 of the ICCPR, it does so for the legitimate purpose of prohibiting online material that may incite crime, violence or mass panic, and to protect Australians from material that is likely to be harmful and offensive to public morals.

Right to protection from national, racial, or religious hatred

Article 20(2) of the ICCPR contains mandatory limitations on freedom of expression. It provides that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

This instrument provides the eSafety Commissioner with a function to promote online safety by protecting Australians from access or exposure to material that promotes, incites, or instructs in, terrorist acts or violent crime.

Australia has anti-discrimination legislation in place. However, online actors who disseminate material advocating, inciting or promoting violent crime or terrorism are often anonymous or operating outside Australia. This material commonly includes content that contains national, racial or religious hatred seeking to incite violence – especially in relation to radical terrorist or extremist content. This instrument is compatible with Article 20 of the ICCPR, as it prohibits advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Conclusion

To the extent that this instrument limits human rights, it does so in a way that is necessary and proportionate to promoting public order, protect public morals and preserve competing rights.

The Hon Paul Fletcher MP
Minister for Communications, Cyber safety and the Arts